UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

ABITIBI CONSOLIDATED, INC.

and

Case 8-CA-35929

BERNARD STARR & DONALD ORMS, Individuals

Rudra Choudhury and Kelly Freeman, Esqs., for the General Counsel.

Christopher V. Bacon, Esq., (Vinson & Elkins, L.L.P., of Houston, Texas, for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cleveland, Ohio, on November 9-10, 2005. Bernard Starr and Donald Orms filed the unfair labor practice charge that gave rise to this matter on June 22, 2005. The General Counsel issued a Complaint predicated on that charge on August 30, 2005.

Respondent, Abitibi Consolidated, Inc., terminated Starr and Orms, two of its truck drivers, on June 3, 2005. The General Counsel alleges that in doing so Respondent violated Sections 8(a)(1) and (3) of the Act. More specifically, he alleges that Abitibi terminated these two employees in retaliation for union activity and/or other concerted activities for their mutual aid and protection. The General Counsel also alleges that Respondent violated Sections 8(a)(1) and (3) in giving Orms a negative performance appraisal on May 20, 2005 and issuing written improvement plans to both Starr and Orms on May 23, 2005. He alleges Abitibi violated Section 8(a)(1) in promulgating a rule in February 2005, prohibiting the charging parties from discussing workplace issues with each other and from carpooling to work. Further the General Counsel alleges that Respondent violated Section 8(a)(1) in coercively informing Orms and Starr to cease discussing working conditions with other employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, Abitibi Consolidated, Inc., a corporation, which has administrative offices in Houston, Texas, collects paper products for recycling at a number of facilities, including one in Cleveland, Ohio. At its Cleveland facility, Respondent annually purchases and receives goods

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and materials valued in excess of \$50,000 directly from points located outside of Ohio. Respondent ultimately sells recycled paper after it has been processed at its mill in Ontario, Canada. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Teamsters, Local Union 244 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent collects paper products from entities such as schools, churches and municipalities and sells recycled paper products after they have been processed at its mill in Ontario, Canada. It operates collection points in a number of localities in different states, including the one involved in this case, which is located in Cleveland, Ohio.

In Cleveland, Respondent leases space in a trucking terminal owned by a company named Carauster. Abitibi employs drivers who collect paper. These drivers report each morning to the Penske Trucking terminal, which is located about 10 miles from the Carauster terminal. At Penske, the drivers sign in on an honor system in the very early morning, generally around 3:00–4:00 a.m., and then go out on their first collection route, which is assigned to them the previous evening. When their truck is full, or they have collected 25,000 pounds of paper, or when their route is completed, the drivers drive their truck to Carauster facility where it weighed. Carauster weighs Respondent's trucks when they are full and then after their contents have been emptied. The driver then turns in a ticket showing the weight of the material he collected to Abitibi's office, located on the second floor of the Carauster building. Afterwards, the driver either goes out on another collection route or, if it is the end of their workday, to the Penske terminal where their trucks are left overnight. The drivers punch out on a time clock at Penske.

At the Carauster facility, the paper undergoes some preliminary processing. Carauster also weighs and does preliminary processing for other companies who collect paper for recycling. Carauster employs truck drivers, who are represented by the International Brotherhood of Teamsters, Local 244. These drivers transport paper to Respondent's mill in Ontario. There the paper is processed further and sold. After Respondent terminated the charging parties in June 2005, it made arrangements with other companies to weigh the paper its drivers collect in Northeastern Ohio. As a result, the drivers collecting paper no longer have to drive back to the Carauster facility after finishing routes that are far from downtown Cleveland.

Denise Piotrowski became Respondent's Area Manager in charge of its Cleveland facility in May 2003. In April 2004, Piotrowski hired Charging Party Donald Orms to be a full-time driver of a front end loader, the type of truck used to collect paper products. In April 2004, Respondent did not employ any other full-time regular drivers, although it had done so in the past.

In June 2004, on Orms' recommendation, Piotrowski hired Charging Party Bernard Starr as a driver. Starr is Orms' neighbor in Ravenna, Ohio, which is located 50 miles from downtown Cleveland. When she hired Starr, Piotrowski expressed concern about Orms and Starr's intention to carpool to work. She told them that she was afraid that if either Orms or Starr had car trouble or similar difficulties that neither would get to work. Starr assured Piotrowski that he

¹ The drivers also periodically drive a different type of truck to deliver collection bins to the sites from which they pick up paper.

had an automobile and would be able to get to work regardless of whether or not Orms was able to do so

In October 2004, Piotrowski hired a third full-time regular driver, Alonzo Duckworth, and Cathy Schoen, a customer service representative, who assisted her in the office. Respondent also occasionally used some part-time drivers to collect paper.

Orms testified that he had a conversation with Piotrowski in November 2004 in which he told her that he talked with Starr and Duckworth and that all three drivers were very unhappy with the manner in which the routes were either organized, or assigned, or both. He further testified that Piotrowski told him that he should worry about himself and not about other drivers. According to Orms, he then told Piotrowski that if conditions did not improve, "we're just going to be forced to go to the Union." He also testified that Piotrowski told him that if he got a Union into the facility, Abitibi would fire her, Tr. 112-113.

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Piotrowski testified that she did not recall Orms ever making any statement regarding the Union or a union to her. However, she testified that if he had made such a comment, she "would be very concerned and I would probably call my boss and probably human resource," Tr. 398. Piotrowski, however, did testify that Orms had told her that he had belonged to a Union in a previous job. She denies being aware that the Carauster drivers were unionized.

I find it impossible to resolve this conflict in testimony and thus I decline to make a finding of fact that Orms told Piotrowski that the drivers might be forced to go the Union, or something of that nature.

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On February 25, 2005, Piotrowski gave Orms three performance appraisals and Starr two appraisals. For both employees, each review covered a three month period. Piotrowski rated the employees on a scale of 1-5 in several areas; safety, skills, dependability, productivity, initiative and compatibility. A 1 rating was "inadequate;" 2 was for "needs improvement;" 3 meant "Good;" 4 signified "Very Good;" and 5 indicated "exceptional" performance. Piotrowski gave both Orms and Starr appraisals that were generally positive. The only area in which either was rated below "Good" was a "2" rating she gave to Starr in the "initiative" category for his first quarter. Her comment in this regard was that:

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Bernie was rated a two in this classification based on the fact that when he has good ideas he doesn't take the lead to bring them up at meetings. He discusses these ideas or concerns with Don Orms, who he drives with and allows Don to refer to him when bringing them up at a meeting.

40 GC Exh. 29; also see Tr. 408-09.

For the second quarter, Piotrowski gave Starr a 3 or "Good" rating for initiative. Her comments, however, were similar in disapproving of Starr and Orms acting in concert regarding workplace issues.

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I would like to see Bernie become more involved in the monthly safety meetings regarding any issues he has. In the past, one of his co-workers has brought up issues Bernie apparently had. If this is not the case, it would be my suggestion that Bernie not discuss issues when carpooling if he doesn't want his co-worker to bring the issue up during the meeting.

Orms' performance appraisals (GC Exh. 16) were also adversely affected by his carpooling with Starr and "involving himself in everyone's business." When meeting with Starr to give him his performance appraisal, Piotrowski also told Starr that his evaluation would be better if he did not carpool with Orms (Tr. 300). The two drivers continued to carpool despite Piotrowski's admonition.

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On March 7, 2005, Starr went on medical leave. Piotrowski hired Starr's son to fill in for him as a temporary driver. Either just before Starr returned to work on April 18, or two weeks earlier, Orms went on medical leave. Thus, Orms and Starr did not work together from March 7 until May 9, when Orms returned to work. However, during this period, on April 2, the two sent a letter to Piotrowski; her boss, Dave Vardell, Abitibi's Northern Regional Manager; Jennifer Breckinridge, Respondent's Human Resources Manager and Abitibi's General Manager, Michael Sullivan. Vardell, Breckinridge and Sullivan work in Houston, Texas, GC Exh. 18.²

Orms and Starr's letter in essence states that in February 2005 Denise Piotrowski told them that they were to stop carpooling to work because they always seemed to return to the Carauster terminal at the same time. They denied waiting for each other prior to returning to the terminal and took exception to Piotrowski bringing up their carpooling during Starr's performance evaluation. Respondent, by Human Resources Supervisor Stephanie Jacobson, responded to the charging parties' letter on May 10, GC Exh. 19.

Orms also contacted the Union after April 2, and he, Starr and Duckworth met with a Teamsters representative. There is no evidence that Respondent was aware of the charging parties' contacts with the Union.

On Orms' first day back to work, May 9, 2005, he received a memo stating that drivers would be written up if seen in the Carauster yard without the safety vest that had been issued to them. Respondent issued its drivers safety vests in response to a near fatal accident in which one of Carauster's employees was pinned between two vehicles.

On May 9, Orms also noticed that Respondent had posted the tonnage per hour figures for himself, Starr and Alonzo Duckworth. He talked to Starr about this and Starr called Regional Manager Dave Vardell in Respondent's Houston, Texas office to ask for a meeting.

The next day, May 10, Orms left his truck and walked to Respondent's second story office at the Carauster facility, to turn in his weight ticket, without wearing his safety vest. Cathy Schoen asked Orms why he wasn't wearing his safety vest. Orms told her he didn't have to wear it in the building. Schoen told Orms that it was Respondent's policy that drivers wear their safety vest at all times in Carauster's yard. Orms apparently complied with this policy thereafter.³

² Piotrowski received her copy from Respondent's office in Houston, not directly from Orms and Starr. It is not clear when she became aware of the letter.

³ On May 18, Piotrowski sent a memorandum to Orms regarding Respondent's safety vest policy, Exh. R-5. The memo refers to a verbal warning Orms received at the May 11 safety meeting. There isn't any evidence regarding such a warning in this record other than the hearsay evidence in the memo. In fact, David Vardell's testimony at Tr. 262 is that he merely emphasized to Orms that Respondent's employees had to abide by Carauster's policy. Vardell did not testify that he warned or chastised Orms for not wearing his vest on May 10. Therefore, this record does not establish that Orms received any sort of warning for failure to wear his safety vest on May 10.

On May 11, Vardell, Piotrowski and Schoen met with Respondent's three drivers; Orms, Starr and Duckworth. The subjects discussed included the safety vest policy, routings, the drivers' hours and the daily posting of comparisons with respect to tonnage per hour. At this meeting, Orms characterized Schoen, who had begun working on the routes in April, as "directionally dysfunctional." In response to the drivers' concerns, Piotrowski told the drivers that she was hiring a temporary secretary to help out with office duties, so that she could spend more time working with Cathy Schoen on routing. Vardell said he would continue to post the performance comparisons, although Respondent did not do so. He or Piotrowski also told the three men that additional drivers would be hired.

Denise Piotrowski sent a memorandum to Orms, Starr and Alonzo Duckworth on May 16, 2005, entitled "Pick-ups, driver hours, assigned routes and total tonnage per route," GC Exh. 5. She informed the three drivers that they must call either Piotrowski or Cathy Schoen if they intended to collect paper from another driver's route when the other driver was unable to complete his route.

The second paragraph of Piotrowski's May 16 memorandum addresses *driving* hours as follows:

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I would also like to clarify driving hours, especially since I was confused on this issue. I verified with DOT the new law for 2004. Drivers have received their new Safety Regulations pocketbook for 2005/2006. Each driver is responsible for adhering to DOT regulations. No driver is to drive over 12 hours in a workday. Should a driver work less than the maximum twelve-hour limit, and work more than five days, they are not to exceed the 60-hour regulation. When routes are established, or delivery logs scheduled for containers, it is mandatory that the driver manage his hours for the day. Example, the office does not know how long it will take a driver to do the route or deliver containers. So if the amount of work assigned cannot be completed because of the twelve hour maximum per day DOT requirement, then the driver is responsible to end his workday and notify the office.

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The relevant regulations of DOT's Federal Motor Carrier Safety Administration state as follows:

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49 CFR Section 395.2 provides that "*Driving time* means all time spent at the driving controls of a commercial motor vehicle in operation."

49 CFR Section 395.3 provides in pertinent part:

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Subject to the exceptions and exemptions in Section 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a propertycarrying commercial motor vehicle, nor shall such driver drive a property-carrying commercial vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off duty, or

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of Section 395.1(o).

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(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers, using the driver's services, for any period after(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or...

5 The final paragraph of Piotrowski's May 16 memo stated:

With the OBC [on board computer] being installed, it is mandatory that no driver goes over 25,500 lbs. per truck. The maximum amount should be 25,000, so 25,500 has been stated only to reflect a few hundred pounds that might go over 25,000. An example-25,125! Drivers are responsible to insure that the scale on their truck is calibrated. Everyone has been notified that we will have the OBC installed on June 13th. All scales MUST be calibrated no later than June 3rd.

On May 18, Piotrowski sent the drivers another memorandum regarding route changes. She reiterated that no changes were to be made to the routes the drivers received without the approval of either Piotrowski or Cathy Schoen. The memorandum further stated:

Not complying with this problem will result in a failure to follow management instructions and be considered as being insubordinate and a mandatory two days off of work without pay.

GC Exh. 27.

Respondent did not allow Orms to drive between May 20 and May 23, due to an issue regarding his history of heart problems.⁴

Written Improvement Plans Issued to Orms and Starr on May 23, 2005.

Starr's Written Improvement Plan

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On May 23, 2005, Piotrowski issued a written improvement plan to each of the charging parties. The plan issued to Bernard Starr was based on three issues. The first concerned a complaint from the principal of the Betty Jane Elementary School to the effect that on May 19, Starr had left paper all over the ground at that collection site.⁵ The second was that he had

4 The General Counsel argues

⁴ The General Counsel argues at pages 27 & 28 of his brief that Respondent was discriminatorily motivated in ordering Orms to be medically recertified. This issue was not alleged as a violation in the Complaint and thus, I decline to address it.

⁵ Respondent introduced a document, Exh. R-8, purportedly a Memorandum that Cathy Schoen wrote on May 19 and placed in Bernard Starr's personnel file. This document has absolutely no probative value in establishing the truth of the matters asserted therein. Ms. Schoen could not recall any specifics regarding the information contained in the exhibit and Respondent merely had her identify it and then moved for its admission. Respondent did not ask Ms. Schoen if it refreshed her recollection as to what occurred. Schoen testified that she never gave the document to Starr, but simply placed it in his personnel file. Schoen testified that she drafted exhibit R-8, but was not asked, nor did she testify as to when she drafted it. When asked why she drafted the document, Schoen testified that she was requested to do so by Ms. Piotrowski. Based on the fact that exhibit R-8 discusses matters not contained in Starr's written improvement plan of May 23, I conclude it was drafted after May 23, to build a case to support Starr's termination and I consider it evidence of animus towards his protected concerted activities.

violated DOT regulations and the terms of Piotrowski's May 16 memo in *working* more than twelve hours on May 17, 19 and 20 and *working* more than 60 hours per week (emphasis added). Not only does this plan misstate the substance of the DOT regulations, which only limit *driving time*, it mischaracterized the May 16, 2005 memo and makes allegations which have absolutely no factual basis.

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The May 16 memo set forth no limit on the hours an employee could work, as opposed to the hours he could drive, either in a day or a week. Respondent's drivers spent a significant amount of time performing non driving tasks, including pre-trip inspections, waiting for their trucks to be weighed by Carauster *after the completion of each route*, fueling the vehicles and completing paperwork. There is no evidence that either Starr or Orms ever drove more than the DOT limit of 11 hours in day, let alone the erroneous 12 hour limit set forth in May 16 memo. Respondent's May 16 memo does not specify the nature of DOT's 60-hour regulation. Thus, even if Respondent meant to establish a 60 hour per week limit of duty hours, it failed to adequately communicate this to the drivers. DOT has no limit on working hours, it simply prohibits an employee from driving after he has worked 60 hours.⁶

The third reason given for Starr's written improvement plan concerns Starr's routes for Monday, May 23. Starr had been given three routes for that date, most likely on Friday afternoon. On Sunday, Piotrowski called Starr and told him that another driver had inadvertently run Starr's first Monday route and that he would be getting a new third route. On the 23rd, Starr ran his original third route first, his original second route, second and his new third route third. He testified that he reversed the order of his routes due to construction.

The May 23 written improvement plan alleges that Starr violated his instructions regarding changing routes.⁷ The written improvement plan also contains allegations that rely completely on the hearsay statements made in the document. For example, there is no testimony to support the assertions made in GC Exhibit 12 regarding violations of the Bay Village ordinances on dumping.

On May 30, Starr responded to the written improvement plan, styling his response as an appeal, GC Exh. 32. He sent this appeal to Piotrowski and Respondent's Human Resources Department in Houston. Starr contended that he attempted to pick up the paper from his truck at the Betty Jane School, but could not do so completely due to the arrival of the school buses.

As to the events of May 23, Starr stated that whatever mistake he may have made was inadvertent and due to his misunderstanding of Piotrowski's directions. He noted that whoever ran his first route also varied routes and that he assumed this driver was also reprimanded.

Orms' Written Improvement Plan and Negative Performance Appraisal

Piotrowski issued Orms a written improvement plan on May 23, solely on the grounds that he *worked* 12.47 hours on Wednesday, May 18. On the next day, Orms commented on the plan document, noting correctly that he had not violated DOT regulations, as Piotrowski had

⁶ Starr may have been in violation of DOT regulations for the week ending May 20, if he drove during the last 3.6 hours that he was on duty that week.

⁷ Starr may not have had any opportunity to inform the office as to why it might be advisable to run the original third route first, because he normally began his first route hours before Piotrowski or Schoen would be at work.

alleged. Moreover, it is readily apparent that Respondent did not have any policy of its own prohibiting more than 12 hours of *work*, as opposed to driving in a day.

Orms also received a performance appraisal from Piotrowski on May 23, for the fourth quarter of his employment. Unlike the February appraisals, this one was very negative.

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Other events in May

Some time in May, Respondent became aware of a Teamster's organizing drive at its Chicago terminal. Although Starr testified that the Teamster's Union Steward at Carauster initiated a conversation about the Union with him beneath Piotrowski's office window, I conclude that there is insufficient evidence to find that Respondent was aware of any union activity on the part of its employees in Cleveland.

On or about Monday, May 31, when Orms turned in one of his work tickets, Cathy Schoen chastised him for adding a stop. Orms angrily told Schoen that she had directed him to go to that location. After some discussion, Schoen conceded that she had added that stop to his route. Orms told Schoen that he was tired of her constantly insinuating that he was lying to her. Schoen claims that Orms clinched his fist and his teeth at this point; Orms denies making any threatening gestures or using any threatening language in this conversation. In any event, Respondent did not rely on any threatening conduct to justify its termination of Orms. Respondent's internal memo regarding the charging parties termination states only that Orms "verbally and visually displayed his anger towards Cathy regarding questions involving scheduling," R. Exh. 6.8

Events of June 1, 2005

Orms

Orms collected 27,440 lbs of paper on that his first route on June 1, R. Exh. 1. Respondent's drivers carried a route sheet with them as they went to all their collection points. As they went to each stop, the drivers recorded the time they arrived, their odometer reading, an estimate of how much paper was in the bin or bins they were collecting and an estimate of the weight of the paper in each bin.

The fullness of the bin was estimated by the driver writing a 2 if the bin was ¼ full; 4 if it was half full; 6 if it was ¾ full and an 8 if it was full. The drivers had a scale on their truck but these scales were not accurate. They essentially made their estimates of the bins' weight by eyeballing it.

When Orms returned to the Carauster facility on June 1, Cathy Schoen added up the totals of the estimates made by Orms for the 13 bins he had collected. The figure was 30,260 lbs. Orms did not keep a running tally of the estimated weight of the bins he collected as he went from collection point to collection point. There is no evidence that he was ever told to do so and no evidence that any other driver did so.⁹

⁸ Orms testified that this incident occurred on June 1. Comparing his testimony, Schoen's testimony and exhibit R-1, I think it most likely occurred on Tuesday, May 31, the day after the Memorial Day holiday.

⁹ I credit Orms' testimony that he was never given a calculator to keep track of how much paper (in weight) he had picked up and discredit Piotrowski's testimony to the contrary at Tr.

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Starr

On June 1, 2005, Bernard Starr was assigned to deliver bins to a number of locations and move bins at other locations, including the Densler School near Akron. He did not drive to the Densler School that day. Starr testified that to do so would have required him to work more than 12 hours. Starr called Piotrowski and informed her that he did not get to Densler. She told Starr that the school officials had called her several times and that the bins at the school had to be moved to the rear of the building. Piotrowski told Starr to move the bins at Densler the first thing on the next morning, June 2. He did so.¹⁰

Events of June 2, 2005

Orms

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On June 2, Orms pulled down some wires when leaving a collection point. Respondent did not cite this as a reason for his termination. On this date, he also called Brenda Kramer, a human resource department employee in Houston to inquire about filing "harassment charges" against Cathy Schoen.

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Starr

On Starr's first route on June 2, he collected 28,920 lbs. of paper, R. Exh. 3. Cathy Schoen added up the estimates that Starr recorded for each of the ten bins he picked up and came up with a total of 26,100 lbs. When Starr arrived at the Mercer Elementary School at 7:10 a.m., the last point at which he picked up on this route, his estimated total was 23,100 lbs. After loading one full bin at that site, Starr returned to Carauster, rather than going to other stops on that route.

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There is no evidence that Starr would have known that the Mercer bin would be full or that he was given instructions to keep a running total of his estimated weights as he went from stop to stop. Moreover, there is no evidence that he was ever told what he was supposed to do if he had totaled up his estimates for the previous stops and was within 3,000 lbs of the 25,000

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¹⁰ Piotrowski testified that when Starr called her, she told him that moving the bins "was the first thing of the day you were supposed to do." (Tr. 429) Starr's testimony is that prior to June 1, Piotrowski told him to move the bins at Densler if he could get to it. He testified that when talking to her on June 1, after finishing his routes, she told him to move the bins first thing in the morning when discussing his tasks for June 2. I am unable to resolve this conflict in testimony and thus do not credit either's account.

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¹¹ Respondent, at page 17 of its brief, states that Orms violated company policy by failing to report this accident in writing by the end of his shift. Orms' testimony is uncontradicted that he immediately reported the accident to Piotrowski and that she told him an accident report form would be in his box when he returned to the terminal. His testimony is also uncontradicted that the form was not in his box until June 3, when he filled it out.

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Respondent also elicited testimony regarding an obscene decal that was sown on one of Orms' jackets and a discussion he had about the decal with Piotrowski. There is no evidence as to when this occurred and in any event it was not mentioned by Respondent as a reason for his termination or any other disciplinary action.

^{439.} None of the route sheets, or any other evidence in this record indicates that any drivers kept a running total of how much paper they had picked up.

limit. It is also obvious from that fact that Respondent had put many more stops on this route, that it had no idea as to how full the bins would be at each stop. Had Respondent known all or most of the bins were full and the weight of a full bin, it would presumably have put fewer stops on the route.¹²

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Bernard Starr's alleged failure to switch bins at the St. Johns Lutheran Church in a timely fashion

At some time during the first three days of June 2005, Denise Piotrowski received a call asking that Respondent remove a bin at the St. Johns Lutheran Church, which had been defaced by graffiti, and replace it with a clean one. This assignment was given to Bernard Starr and he completed it. There is a conflict in the testimony as to who gave Starr the assignment, when it was given to him and under what circumstances. This is also conflicting evidence as to whether Starr complied with his instructions in a timely fashion.

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Starr testified that he was verbally given the assignment on June 3, by Cathy Schoen and that he completed it as ordered. Piotrowski testified that she gave Starr the assignment on June 2, but that he failed to switch the bins on that date as ordered and completed the assignment the next day.

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Starr and Piotrowski both testified that Starr went to the West Side Market in Cleveland where he found Orms picking up paper that was all over the ground. Starr testified this occurred on June 2, after he had switched the bins at the Densler School. He testified that he called Piotrowski and asked for permission to assist Orms and that Piotrowski denied this request and told him to continue doing his route. According to Starr's testimony, there is no connection between his trip to the West Side Market and his assignment to switch bins at the St. Johns Lutheran Church.

Piotrowski testified, in a somewhat inconsistent and confusing manner, that she told Starr to switch the bins on June 2, Tr. 429-31, 451-2. Piotrowski corroborated Starr's testimony that he called her from the West Side Market to ask permission to help Orms and that she told him not to do so. Then she testified that, "he should have been delivering containers and taking care of Saint Johns' Lutheran," Tr. 431. R. Exhibit 2, Orms' route sheet for his first route on June 1, strongly suggests that the incident at West Side Market occurred on that date on not on June 2, as testified to by both Starr and Piotrowski. Orms arrived at the West Side Market at 4:30 a.m. on June 1 and collected an estimated 6400 lbs of paper. He also estimated that he spent 90 minutes at the site picking up paper. Orms' next stop was at 6:15, two miles away.

Starr's first route sheet for June 2 indicates he arrived at the Densler School at 4:00 a.m. His next stop was at 5:05 at the North High School, after he had driven 33 miles. At 5:30 on June 2, Starr was at the Gates Mills Club, after driving 10 miles. At 5:45 he arrived at St. Francis of Assisi Church. At 6:15 he arrived at the Grace Lutheran Church.

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¹² There appears not to have been any common understanding among the drivers or Respondent's office staff that a full bin typically weighed any particular amount. Starr's estimates for a full bin are generally about 3,000 lbs. Orms, on June 1, estimated a full bin as high as 3,700 lbs. and as low as 1,200 lbs. Alonzo Duckworth's estimates for a full bin ranged from 3400 lbs to 2200 lbs. on the route slips contained in G.C. Exhibit 6. However, Cathy Schoen testified that Respondent knew generally what a full bin weighed.

From these portions of the record, I conclude that Piotrowski did not tell Starr to replace the bins at St. Johns Lutheran Church when he called her from the West Side Market, which I conclude occurred on June 1. I discredit her testimony that she told him to replace the bins on June 2 and credit his testimony that he was given this assignment by Cathy Schoen on June 3.13

Events of June 3, 2005

Orms

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Orms drove two routes on June 3. When he returned from the second route, Piotrowski handed him a termination notice, GC Exh. 2. She provided no oral explanation for his termination. The document states that Orms was terminated for "failure to follow management instructions for continuing to operate a vehicle in an overweight condition and not following management instructions."

Starr

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Starr completed two routes on June 3, including the switching of bins at St. Johns Lutheran Church, an assignment he received earlier that day from Cathy Schoen. When he returned from the second route, Denise Piotrowski gave him a termination notice, GC Exh. 3, which gave as the reason for his termination, "Failure to follow management instructions for continuing to operate a vehicle in an overweight condition and not following managements (sic) direction." Piotrowski did not comment orally on the reasons for his termination.

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Afterwards, Starr called David Vardell in Houston and asked Vardell why he was being terminated. Vardell told Starr in a voice mail that he was terminated for overloading his truck.

Evidence regarding employees collecting more than 25,500 lbs. of paper after May 16, 2005.

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The only direction given to Respondent's drivers regarding overloading their trucks is the May 16, 2005 memo. On or after that date, Donald Orms collected more than 25,500 lbs on one occasion (June 1) and Bernard Starr collected more than 25,500 lbs. on one occasion (June 2). Alonzo Duckworth exceeded this limit on six occasions:

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May 16, 29,780 lbs. May 16, 26,440 lbs. May 17, 29,240 lbs. May 25, 25,720 lbs. May 31, 25,760 lbs. June 2, 26,620 lbs.

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¹³ I find Piotrowski to be generally an incredible witness. Her testimony throughout the hearing consisted of post-hoc justifications for the terminations of Orms and Starr. A blatant example of this is her testimony at Tr. 442 in which she distinguishes Alonzo Duckworth from the charging parties on the grounds that he was contrite when confronted with his misdeeds. In fact, one of Piotrowski's memorandums to Duckworth describes his reactions to constructive criticism as "argumentative" on April 28, 2005. On April 18, he apparently lied to Piotrowski regarding the circumstances surrounding his receipt of a traffic citation for spilling paper all over a roadway. Duckworth apparently lied again to Piotrowski and Schoen on May 12, as to why he failed to collect paper from the West Side Market, Exh. G.C. 9.

Respondent did not discipline Duckworth for overloading his truck. Part-time driver Steve Ralish collected 25,780 lbs on May 22, and 31,240 lbs. on May 25. There is no evidence that he was disciplined, warned or counseled about overloading his truck either. Respondent attempts to distinguish the incidents in which Duckworth overloaded his truck by the fact that Duckworth's estimates of the weight he collected were less than 25,500 lbs., when added up by Cathy Schoen. That is not true with respect to Ralish. The total of the weight of the paper he estimated for each bin on May 25, amounted to 35,240 lbs.¹⁴

Furthermore, Respondent's explanation of why Duckworth's repeated overloading of his truck was less culpable than the charging parties' single instance of overloading is not credible. Respondent knew generally what a full bin of paper weighed, Tr. 504. Given this information and the driver's estimate of whether each bin collected was a quarter full to completely full, a driver's repeated low-balling of the paper he collected would not be a legitimate reason to repeatedly overload his truck.

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Moreover, Duckworth was not a perfect employee in other respects. Piotrowski counseled him in writing on May 18, for his lack of cooperation and argumentative behavior when asked to complete scheduled routes or help with paper on the ground, GC Exh. 9(a). She also counseled him the same day for a citation Duckworth received on April 18, 2005 for driving with an unsecured load. Respondent paid a \$197 fine for this citation, GC Exh. 9(b). Piotrowski also counseled Duckworth specifically on his failure to pick up paper around a bin at the Cleveland West Side Market on May 12, and then lying to Piotrowski that the reason he failed to do so was because of garbage piled around the bin, GC Exh. 9(c).

25 Analysis

First of all, I conclude that the General Counsel has not established a violation of Section 8(a)(3) due to the fact that he has not shown that Respondent was aware of, or suspected any union activity on the part of the charging parties. However, I conclude that the General Counsel has established a violation of Section 8(a)(1).

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection... (Emphasis added)"

In Myers Industries (Myers I), 268 NLRB 493 (1984), and in Myers Industries (Myers II) 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of

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¹⁴ Ralish's route sheet for May 22 appears to be incomplete. It also appears that somebody added the total of his estimate weights for 16 bins at 24,370 lbs. and then realized they missed one and came up with a total of 27,370 lbs for 17 bins. Piotrowski's testimony (Tr. 438) that Ralish picked up 7 bins on that route is clearly mistaken. Ralish began his route at 9:42 a.m. and completed it at 3:00 p.m. The last stop of exhibit 6(d) was made at 11:52 with an odometer reading of 7418. When Ralish finished his route his odometer read 7485.

initiating or inducing group action, *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683, 685 (3d Cir. 1964).

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Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1) the General Counsel must establish that the employer knew of the concerted nature of the activity.

In the instant matter, the General Counsel has established that Donald Orms and Bernard Starr engaged in concerted protected activity and that Respondent was aware of this activity and its concerted nature.

I infer animus and discriminatory motive with respect to the charging parties' terminations and the written improvement plans from a variety of factors. One of these is that the pretextual nature of the reasons given for these adverse personnel actions. In turn, I conclude these reasons are pretextual from several factors: first, neither Starr nor Orms violated Respondent's policies or work rules with regard to *driving time* or hours worked, or the DOT regulations on these matters. Indeed, Respondent did not have any rule or policy limiting the number of hours worked in a day or a week. Thus, there is absolutely no factual basis for the written improvement plan Piotrowski gave to Orms on May 23.

Similarly, Respondent did not have an unambiguous rule that made it clear that a driver must not exceed 25,500 lbs. as of June 3, 2005. Piotrowski's May 16, memo in tying this prohibition to the installation of the on-board computers suggests that the "rule" would become effective with the installation of the computers and the calibration of the scales that were situated on the forks of the trucks.

Respondent's disparate treatment of Starr and Orms, compared to Duckworth, who overloaded his truck far more frequently, is another basis for my conclusion that the stated reasons for the charging parties' discharge and discipline was pretextual and these personnel actions were taken in retaliation for their protected activities. On June 2, Respondent gave Duckworth a written note regarding overloading his truck for the sixth time since May 16, advising him to get the scales on his truck calibrated. Not only did Respondent terminate the charging parties after only one instance of overloading the truck, Piotrowski cancelled their efforts to get their scales calibrated in late May (Tr. 413-14).

Respondent treated the charging parties disparately compared to Duckworth with regard to the written improvement plans, as well as with regard to termination. Abitibi did not give Duckworth a written improvement plan for littering or lying, misconduct more serious than that alleged in the charging parties' written improvement plans. The memorandums issued to Duckworth on May 18, do not appear to constitute formal discipline that would initiate Respondent's progressive discipline process.

Respondent's failure to follow this progressive discipline process, which is set forth in its employee handbook, GC Exh. 14, is another reason leading me to conclude that reasons given for the terminations are pretextual. The handbook provides that discipline is generally to be meted out in a four step process; documented discussion, written counseling; decision day (final written counseling and one-day suspension with pay); and finally termination. The handbook does provide for immediate termination for improper behavior of a particularly serious nature. As examples, it cites insubordination and theft.

Respondent, at a minimum skipped the suspension step in terminating Starr and Orms. It contends it did so because they were insubordinate. However, that is clearly not the case particularly with respect to Starr, who Cathy Schoen described as, "a very nice cooperative man. He always seemed to try to get along with everybody. He was cooperative and helpful to me" (Tr. 490). Moreover, Starr's appeal letter of May 30, demonstrates that he was not insubordinate; at worst he made an honest mistake in misinterpreting his instructions.

Furthermore, I have found that several instances of alleged "insubordination" or Starr's failure to comply with Respondent's instructions simply did not occur. He did not fail to comply with Piotrowski's instructions with regard to moving the bins at the Densler School, nor with the instructions he received regarding the switching of bins at the St. John's Lutheran Church. Moreover, I conclude that Piotrowski did not have a good faith belief that Starr failed to comply with these instructions. These incidents are an afterthought utilized to justify Starr's termination. Indeed, Starr's termination was apparently an afterthought to Respondent's decision to terminate Orms for raising mutual concerns of the three drivers with Piotrowski's superiors. 15

¹⁵ The process by which Respondent decided to fire Orms and Starr is not clear. I find the testimony of Respondent's witnesses as to who made the decision, when it was made and how it was made incredible.

On the first day of the hearing, Piotrowski testified that the individuals involved in the termination were herself, David Vardell, Jennifer Breckinridge, the H.R. Manager; Michael Sullivan, the General Manager; Ben Walker, who is a government affairs official; and John Selman, whose position in Respondent's hierarchy is not described. She did not testify as to the nature of the involvement of any of these individuals. Thus, Piotrowski's testimony, when called as a witness by the General Counsel, left open the issue as to who made the final decision to terminate the charging parties, as well as when and why that decision was made.

When testifying on the second day of the hearing, Piotrowski testified that she decided to terminate the charging parties on June 2.

Vardell testified that he reviewed a summary of issues prepared by Piotrowski and that he agreed with the terminations. Respondent introduced a summary of issues that Piotrowski testified she prepared on the morning of June 3, hours before she handed Orms and Starr their termination notices. Vardell did not identify this summary, Exh. R-7, as the document he reviewed with human resources. Obviously, if it was prepared on June 3, Piotrowski would have had to have faxed the document to Vardell and he would have had to have reviewed it with human resources just prior to the terminations. There is no evidence that the document was faxed to Houston or that Vardell discussed this document with anyone in Respondent's human resources department on June 3.

Moreover, Exhibit R-7 is obviously inaccurate in asserting that Orms and Starr "continue to ignore weight restrictions on the truck." Each driver had exceeded the weight restrictions once since receiving the May 16 memo.

Piotrowski had a conversation with Stephanie Jacobson, a human resources supervisor, on June 2, regarding the charging parties. Jacobson testified that she is the one who suggested that Starr be terminated as well as Orms, which I find completely incredible as there is no evidence that Jacobson would have been familiar with Starr's work record. Her testimony at Tr. 385-386 and 478 would suggest that Jacobsen made her recommendations on the basis of deliberately inaccurate information provided to her by Piotrowski as to the charging parties' alleged repeated violations of the weight restrictions and the non-existent 12-hour work rule, as well as misinformation regarding Respondent's policies and the DOT regulations.

Finally, Starr testified that in response to his call, Vardell left him a voice mail informing him that he was fired for overloading his truck. This testimony is uncontradicted. This is further evidence that none of the reasons given for the terminations of the charging parties are the real Continued

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The testimony of Human Resource Supervisor Stephanie Jacobson, while not credible in many respects, persuades me that Piotrowski was initially seeking approval only for the termination of Orms, but that Starr was terminated in the mistaken belief that to do so would make the termination of Orms appear to be less discriminatory. In fact, the termination of Starr makes both personnel actions more obviously discriminatory since Respondent had absolutely no basis for characterizing Starr as insubordinate, which is generally deemed to be deliberate, willful or defiant conduct as opposed to an inadvertent failure to comply with an employer's instructions.

This is not to suggest that Orms and the drivers were correct, or that Piotrowski was not doing the best job she could do under the circumstances. However, Section 8(a)(1) makes it illegal to discharge or discipline an employee for concertedly raising issues of mutual aid and protection outside the chain of command.

The terminations herein are also inconsistent with Piotrowski's May 18 memo in which she advised the drivers that if they varied a route without her approval, they would be considered insubordinate and subject to a two-day suspension without pay.

Respondent also could not have believed in good faith that either Orms or Starr drove more than 12 hours in a day, or 11 hours, for that matter. I infer that Piotrowski was well aware that they spent a considerable amount of time performing non-driving tasks. Indeed, she had to have observed the drivers at the Carauster terminal waiting for their trucks to be weighed on many occasions. Thus, I conclude that the real reason for the discharge and discipline of the charging parties was retaliation for their going over the head of Piotrowski in seeking redress for their mutual concerns. More specifically, I conclude that the charging parties were disciplined and terminated in retaliation for the April 2 letter and their complaints to Vardell on May 9 and 11, regarding the manner in which the Cleveland terminal was being operated by Denise Piotrowski.

Summary of Conclusions of Law

Respondent violated Section 8(a)(1) of the Act in:

- 1. Coercing the charging parties to cease discussing issues of mutual aid or protection in February 2005;¹⁶
 - 2. Issuing Donald Orms a negative performance evaluation in May 2005;
- 3. Issuing written improvement plans to Donald Orms and Bernard Starr on May 23, 40 2005;
 - 4. Terminating Donald Orms and Bernard Starr on June 3, 2005.

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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reasons they were fired.

¹⁶ I conclude that Respondent did not orally promulgate a rule as alleged in paragraph 6(a) of the Complaint.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

10 ORDER

The Respondent, Abitibi Consolidated, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Threatening or coercing employees in the exercise of their Section 7 rights by informing them not to discuss matters of mutual aid or protection;
- 20 (b) Discharging or otherwise discriminating against any employees for engaging in concerted protected activities for their mutual aid or protection;
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of the Board's Order, offer Donald Orms and Bernard Starr full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Donald Orms and Bernard Starr whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
 - (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, written improvement plans and in the case of Donald Orms, his negative performance review of May 2005, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, written performance plan and Orms' negative performance review will not be used against them in any way.
 - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

- (e) Within 14 days after service by the Region, post at its Cleveland, Ohio facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 2005.
 - (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- 20 (g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 11, 2006.

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Arthur J. Amchan
Administrative Law Judge

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¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT threaten or coerce you from engaging in concerted protected activities for your mutual aid or protection by telling you that such activities will have to stop.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in concerted protected activity for your mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Donald Orms and Bernard Starr full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Donald Orms and Bernard Starr whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges, written improvement plans and negative performance review, and WE

WILL, within 3 days thereafter, notify Donald Orms and Bernard Starr in writing that this has been done and that the discharges, written improvement plans and negative performance review will not be used against them in any way.

		ABITIBI CONSOLIDATED, INC. (Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695 Cleveland, Ohio 44199-2086 Hours: 8:15 a.m. to 4:45 p.m. 216-522-3716.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 216-522-3723